Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CARDELL A. THOMAS,

Petitioner,

versus

THE LOUISIANA ATTORNEY DISCIPLINARY BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the retroactive application of a new rule of the Louisiana Supreme Court which created the new penalty of permanent disbarment violates the *ex post facto* clause of the United States Constitution?

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Cardell A. Thomas
2. The Louisiana Attorney Disciplinary Board

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Petitioner Cardell A. Thomas respectfully requests that this Court issue a writ of certiorari to review the judgment of the Louisiana Supreme Court entered on January 16, 2008, to address the important question of federal law presented.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Louisiana Supreme Court which gives rise to this petition is *In re Thomas*, reported at 973 So.2d 686 (La. 2008). A copy of the opinion is attached to this petition at Appendix 1. The Recommendation of the Louisiana Attorney Disciplinary Board Hearing Committee recommending that Petitioner Thomas be suspended from the practice of law for an additional two years is unreported. This Recommendation is attached hereto at Appendix 18. The Recommendation of the full Disciplinary Board that Petitioner Thomas be permanently disbarred is not reported, either. This Recommendation is attached to this petition at Appendix 40.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

On January 16, 2008, following attorney disciplinary proceedings before the Louisiana Attorney

Disciplinary Board, and briefing and argument before the Louisiana Supreme Court, that Court entered an order "that the name of Cardell A. Thomas, Louisiana Bar Roll number 1148, be stricken from the roll of attorneys and that his license to practice law in the State of Louisiana be revoked. Pursuant to Supreme Court Rule XIX, § 24(A), it is further ordered that respondent be *permanently* prohibited from being readmitted to the practice of law in this state." Appendix 16 (emphasis added). Petitioner did not seek a rehearing before that court.

This Court has jurisdiction under 28 U.S.C. § 1257(a). *See* Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 10 of the United States Constitution provides, in pertinent part:

> No State shall . . . pass any Bill of Attainder, *ex post facto* Law. . . .

Rule XIX, § 10(A) of the Rules of the Supreme Court of Louisiana provides, in pertinent part:

> **Section 10. Sanctions.**
>
> **A. Types of Sanctions.** Misconduct shall be grounds for one or more of the following sanctions.

(1) Disbarment by the court. In any order or judgment of the court in which a lawyer is disbarred, the court retains the discretion to permanently disbar the lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.

STATEMENT OF THE CASE

On January 5, 2000, the Louisiana Supreme Court suspended petitioner Thomas from the practice of law, pursuant to a joint petition for the consent discipline of disbarment. On October 6th of that year, the Supreme Court accepted the petition, and disbarred Thomas.

Between January 5th and October 6th, *2000*, petitioner Thomas took a series of actions in two separate legal matters in which he had been acting as counsel before his suspension. Approximately five years later, in January 2005, the Louisiana Office of Disciplinary Counsel filed formal charges against petitioner Thomas, alleging that his conduct in these matters constituted the unauthorized practice of law.[1] Further, in its formal charges, the Office of

[1] In its 2008 opinion, the Louisiana Supreme Court found that these actions did constitute the unauthorized practice of law – a finding that petitioner does not dispute before this Court.

Disciplinary counsel specifically sought the sanction of permanent disbarment.

The sanction of permanent disbarment had first become available in Louisiana on August 1, *2001*, when the Louisiana Supreme Court order amending Rule XIX became effective. Prior to that date, the most punitive sanction available to the Disciplinary Board was disbarment, but all attorneys who were disbarred were permitted to apply for readmission five (5) years after the effective date of their disbarment.

Petitioner Thomas answered the formal charges against him, generally admitting the facts alleged in the formal charges, but denying that he should be permanently disbarred, on the grounds that to do so would violate his federal and state constitutional right not to be subjected to an *ex post facto* law.

The Disciplinary Board Hearing Committee did not consider Thomas's constitutional arguments, because it did not need to do so: it recommended the sanction of suspension for two years. The Disciplinary Board itself did consider the constitutional claims, but dismissed them summarily, relying upon prior case law of the Louisiana Supreme Court.

The Louisiana Supreme Court relegated petitioner's constitutional claims to a footnote: specifically, footnote 3 of its opinion, in which the Court wrote:

> Respondent asserted that the imposition of permanent disbarment would constitute an *ex post facto* application of the law. However, it is well settled that the amendments to Supreme Court Rule XIX, § 10 and § 24 providing for permanent disbarment do not have an *ex post facto* effect on cases arising prior to the adoption. *In re: Laudumiey and Mann*, 03-0234 (La. 6/27/03), 849 So. 2d 515, *cert. denied*, 540 U.S. 1048, 124 S.Ct. 814, 157 L.Ed. 2d 697 (2003).

Petitioner Thomas submits that the matter is well-settled only in the mind of the Louisiana Supreme Court, and that for the reasons set forth below, his petition for a writ of *certiorari* should be granted.

REASONS FOR GRANTING THE PETITION

1. The unique role of this Court in state attorney disciplinary matters

This Court has long been aware of the essential role it plays in safeguarding the federal constitutional rights of attorneys accused of violating the disciplinary rules of the state in which they practice. For reasons of comity, this Court, and this Court alone, is charged with ensuring that no state is permitted to craft disciplinary rules that violate the First Amendment,[2] or the Fifth

[2] *See, e.g., Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991);

(Continued on following page)

Amendment,[3] or the Fourteenth Amendment.[4] Significantly, the one constitutional protection that this Court has not squarely considered in the context of state disciplinary proceedings is the *ex post facto* clause.

The closest this Court has come in modern times was in *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). However, the Konigsberg Court dismissed, in passing, the petitioner's contentions that California had "fashioned a special procedural rule for the purposes of this particular case," or that California's actions constituted a bill of attainder or *ex post facto* regulation, as the petitioner was warned in advance of the consequences of his refusal to answer the bar committee's questions. *Id.* at 47.

The only other Supreme Court case to even mention the *ex post facto* application of laws in the context of attorney discipline is *Ex parte Garland*, 71 U.S. 333 (1866), which dealt with the enactment of Reconstruction legislation meant to prohibit

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Peel v. Attorney Reg. & Discip. Comm. of Illinois, 496 U.S. 91 (1990); *Keller v. State Bar of California*, 496 U.S. 1 (1990); *In re Shapero*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[3] *Spevack v. Klein*, 385 U.S. 511 (1967).

[4] *Leis v. Flynt*, 439 U.S. 438 (1979); *In the Matter of Ruffalo*, 390 U.S. 544 (1968); *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232 (1957).

Confederate supporters from holding any office with the United States government. The petitioner was an attorney admitted to the Supreme Court, who was a supporter of the Confederacy, but who had been pardoned in full by the President of the United States. *Id.* at 336-337. The Court changed its rules to require that all admitted to practice before the Supreme Court take an oath swearing that they were not Confederate supporters. *Id.* Garland petitioned the Court to allow him to practice before it, in light of his pardon, but without swearing the oath. *Id.* The Court found that because the Act requiring the oath punished acts which were not criminal at the time they were undertaken, it was an *ex post facto* law and was therefore unconstitutional. *Id.* at 378.

Putting the matter most simply, the blatant disregard of federal constitutional rights by the Louisiana Supreme Court – which is addressed below – coupled with the impact of such disregard on numerous attorneys in the State of Louisiana – compels the exercise of jurisdiction by this Court. Because, as noted above, if this Court does not act, no other Court can.

2. The application of Louisiana's amended permanent disbarment rule to conduct occurring before its inception is unquestionably a violation of the *ex post facto* clause.

A law will be constitutionally prohibited under the *ex post facto* clause of Article I, § 10 of the United

States Constitution when it is a penal statute which makes an action, which was innocent when done, criminal and punishes that action, when it makes a crime greater than it was when committed, or when it changes the punishment for a crime and inflicts a greater punishment. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990).

Louisiana Supreme Court Rule XIX, § 10(A) was amended to allow the Louisiana Supreme Court, at its discretion, to permanently disbar any attorney who has been suspended from the practice of law by any court. The amendment went into effect on August 1, 2001. Prior to the amendments, attorneys in Louisiana who had been disbarred could apply for readmission to the bar after five years, although readmission was not guaranteed. Louisiana Supreme Court Rule XIX, § 24(A). But while admission was not guaranteed, it was frequently granted.

In re Laudumiey, 849 So. 2d 515 (La. 2003) is the only case in which the Supreme Court has addressed at length the constitutionality of an *ex post facto* application of this Rule. In *Laudumiey*, the Louisiana Supreme Court held that the application of the amended Rule XIX, § 10(A) to misconduct by attorneys which was committed prior to the effective date of the amended rule was not an unconstitutional *ex post facto* application of the rule. *In re Laudumiey*, 849 So. 2d 515, 521 (La. 2003).

The Louisiana Supreme Court's rationale was that neither the United States Constitution nor the

Louisiana State Constitution prevents a law from being applied to prior conduct, so long as it does not criminalize an act which was innocent when committed or increase the penalty for criminal conduct. *Id.* The Louisiana Supreme Court reasoned that although the amended rules might superficially appear to increase the penalty for conduct, they did not actually do so. *Id.* Rather, the rules only codified a power that the Court had always had: the permanent disbarment of an attorney.

In the eyes of the Louisiana Supreme Court, because the pre-amendment rules allowed that Court, at its discretion, to prevent an attorney seeking readmission from being readmitted to the bar, the amendment changed nothing. The Louisiana Supreme Court found that this was not substantially different from allowing the Court, at its discretion, to permanently disbar an attorney. *Id.* Therefore, under the Court's rationale, because the penalty was not actually altered, the *ex post facto* doctrine did not apply. *Id.* This approach is simply wrong, on any number of levels.

a. Attorney disciplinary proceedings are, at a minimum, "quasi-criminal" in nature, and the effect of attorney disciplinary proceedings is punitive in nature.

Because attorney disciplinary proceedings are, at a minimum, quasi-criminal in nature, and because the effect of disbarring an attorney from the practice

of law is punitive, the retroactive application of Louisiana Supreme Court Rule XIX, § 10(A) satisfies the "penal" requirement of the *ex post facto* clause.

Certainly, the *ex post facto* clause will not apply when a regulatory scheme is non-punitive and civil, *Smith v. Doe I*, 538 U.S. 84, 91-92 (2003). However, despite a legislature's intent, a regulatory scheme can become punitive through its effects; *i.e.,* when the scheme is so punitive in purpose or effect that it negates the legislature's purpose to create a civil remedy. *Id.* at 92. It is the effect of the law, not its form, which determines whether a law is *ex post facto* or not. *Weaver v. Graham*, 450 U.S. 24, 31 (1981).

In Louisiana, the attorney disciplinary proceedings are neither civil nor criminal, but *sui generis*. Louisiana Supreme Court Rule XIX, § 18(A). Thus, to determine whether this new rule creates a criminal punishment or a civil remedy, the Court must apply the test set out in *United States v. Ward*, 448 U.S. 242 (1980). The test first inquires if the rule, either expressly or impliedly, indicates a "preference for one label or the other." *Id.* at 248. Then, the Court determines whether the rule is "so punitive either in purpose or effect as to negate that intention." *Ward*, 448 U.S. at 248-249.

This Court has found seven factors useful in determining whether a rule is penal, although those factors are neither exhaustive nor dispositive. *Id.* at 249. These factors are: (1) whether the sanction

involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

A straightforward application of those factors to the facts before the Court leaves little doubt: the Louisiana Supreme Court's amended rule is punitive. It is unquestionably an affirmative restraint: a permanently disbarred attorney cannot even reapply for admission. And disbarment is certainly a severe punishment – and permanent disbarment even more so. Moreover, it is a sanction that can only be imposed upon a finding of *scienter*. Lastly, the sanction is certainly designed to punish, and to deter, and it applies to conduct that constitutes behavior that is a felony under Louisiana law: the unauthorized practice of law.

This Court's case law fully supports such a finding. *See Ex parte Garland,* 71 U.S. 333 (1866); *Kennedy,* 372 U.S. at 168; *Cummings v. Missouri*, 71 U.S. 277 (1867). Equally supportive is the law of inferior courts. *See United States v. Colorado Supreme Court*, 189 F.3d 1281, 1287-1288 (10th Cir.

1999) – "Courts discipline lawyers to incapacitate the offending lawyer, to deter that and all other lawyers from repeated violations of professional standards and to protect the image of the bar."; *United States v. Stillwell*, 810 F.2d 135, 136 (7th Cir. 1987) – court may consider the deterrent effect upon the bar when determining sanctions.

Having satisfied the requirement that the rule be punitive, it remains only to determine whether it actually increases the punishment.

b. As applied, Louisiana Supreme Court Rule XIX, § 10(A) unconstitutionally increases the punishment for conduct occurring before its enactment.

In *In re Laudumiey*, the Louisiana Supreme Court ruled that the application of the amended Rule XIX, § 10(A) to misconduct by attorneys which was committed prior to the effectiveness of the amended rule was not an unconstitutional *ex post facto* application of the rule. *In re Laudumiey*, 849 So. 2d 515, 521 (La. 2003). The Louisiana Supreme Court's rationale was that neither the United States Constitution nor the Louisiana State Constitution prevents a law from being applied to prior conduct, so long as it does not criminalize an act which was innocent when committed or increase the penalty for criminal conduct. *Id.* Although the amended rules might superficially appear to increase the penalty for conduct, they do not actually do so. *Id.* Instead, the rules only codify a power that the Louisiana Supreme Court has always

had – because the pre-amendment rules allowed the Court, at its discretion, to prevent an attorney seeking readmission from being readmitted to the bar, it is not substantially different from allowing the Court, at its discretion, from permanently disbarring an attorney. *Id.* Therefore, following the Louisiana Supreme Court's rationale, the penalty is not altered. and the *ex post facto* doctrine does not apply. *Id.*

However, this reasoning fails to take into account that there was a possibility of re-admittance to the bar under the pre-2001 rule.

> "The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition. . . . Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense."

Weaver v. Graham, 450 U.S. 24, 29 (1981).

In *Weaver*, Florida changed its rules concerning the calculation of "gain-time" (or "good conduct") provisions available to convicted prisoners, the result of which effectively lengthened the sentences of prisoners who were convicted prior to the amendments. *Id.* at 26. The petitioner, who was convicted

prior to the amendment, sought a writ of habeas corpus, under the theory that the law was a prohibited *ex post facto* law as applied to him and to other similarly situated prisoners. *Id.* at 27. The Supreme Court determined that because the new provisions altered the legal consequences of conduct occurring before the effective date of the statute and because the new provisions "constrict[ed]" the petitioner's legal opportunities, thus making the penalty more onerous, it was an unconstitutional *ex post facto* application, as applied to petitioner and similarly situated prisoners. *Id.* at 31, 35-36.

Although there is no specific right to re-admission, the statute alters the penal provisions by flatly and completely prohibiting attorneys who were disbarred for conduct prior to the amendment date from even re-applying for admission. Just as in *Weaver*, this constricts the legal opportunities available to petitioner, by permanently preventing him from seeking re-admission to the bar. Thus the new rule is an unconstitutional *ex post facto* law, as applied.

CONCLUSION

Wherefore, this Court is respectfully urged to grant Cardell A. Thomas's petition for a writ of *certiorari*.

New Orleans, Louisiana, this 15th day of April, 2008.

Respectfully submitted,

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SUPREME COURT OF LOUISIANA

NO. 07-B-1616

IN RE: CARDELL A. THOMAS

ATTORNEY DISCIPLINARY PROCEEDINGS

(Filed 01/16/08)

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Cardell A. Thomas, a disbarred attorney.

PRIOR DISCIPLINE

Before we address the current charges, we find it helpful to review respondent's disciplinary history since he was admitted to the practice of law in Louisiana in 1983.

Respondent was publicly reprimanded by the disciplinary board on June 27, 1991 and on July 3, 1991. No details are provided in the instant record concerning the misconduct by respondent which prompted these two public reprimands.

In 1992, this court suspended respondent pursuant to a petition for consent discipline. *In re: Thomas,*

592 So. 2d 1288 (La. 1992).[1] Respondent was reinstated from this suspension on May 7, 1992.

On August 22, 1995, respondent was admonished by the disciplinary board for making improper direct contact with prospective clients, in violation of Rule 7.2(a) of the Rules of Professional Conduct.

In 1998, the ODC filed thirteen counts of formal charges against respondent, alleging that he violated numerous provisions of the Rules of Professional Conduct by failing to turn over financial documents, failing to render accountings to clients, neglecting legal matters, failing to protect a third party's interest in settlement funds, and obtaining services by misrepresentation. After respondent answered the formal charges and generally denied any willful misconduct, he filed a petition for consent discipline in which he sought the imposition of a two-year suspension for the misconduct at issue in the formal charges. The ODC concurred in respondent's petition, and the disciplinary board recommended the proposed

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[1] The petition for consent discipline stemmed from respondent's conviction of one misdemeanor count of commercial bribery, a violation of La. R.S. 14:73. For his conviction, respondent proposed that he be suspended from the practice of law for a period of one year and one day, with all but sixty days deferred, subject to a period of supervised probation with conditions, including the payment of restitution. The ODC concurred in respondent's petition, and the disciplinary board recommended the proposed discipline be accepted. This court ultimately accepted the petition for consent discipline, effective march 9, 1992. *In re: Thomas*, 591 So. 2d 1172 (La. 1992).

discipline be accepted. On September 15, 1999, we rejected the petition for consent discipline and remanded the matter to the ODC "for further investigation and, if warranted, the filing of additional formal charges." *In re: Thomas,* 99-2385 (La. 9/15/99), 748 So. 2d 399.

Following remand, the parties filed a joint petition seeking respondent's interim suspension, which we granted on January 5, 2000. *In re: Thomas,* 99-3547 (La. 1/5/00), 752 So. 2d 169. Thereafter, respondent and the ODC filed a joint petition for consent discipline. Respondent generally admitted the factual allegations of the formal charges filed in 1998, as well as the factual allegations of some twenty additional matters still under investigation by the ODC, including failure to cooperate in a disciplinary investigation, improper payment of referral fees to various individuals, failure to keep clients reasonably informed about the status of cases, neglect of legal matters, and failure to pay funds owed to third-party providers. The parties proposed that respondent be disbarred for this conduct. On October 6, 2000, we accepted the petition for consent discipline and disbarred respondent. *In re: Thomas,* 00-1952 (La. 10/6/00), 770 So. 2d 323. Respondent has never sought readmission from his disbarment.

Against this backdrop, we now turn to a consideration of the misconduct at issue in the present proceeding.

UNDERLYING FACTS

Count I – The Collins Matter

In September 2000, the ODC received a complaint against respondent filed by his clients, Vernell and Lisa Collins. In July 1997, Mr. and Mrs. Collins retained respondent to represent them in a claim for damages arising out of injuries sustained by Mrs. Collins in an automobile accident. In June 1998, respondent filed suit on behalf of his clients, *Lisa Collins, et al. v. Weiner Bros., et al.*, No. 98-10743 on the docket of the Civil District Court for the Parish of Orleans. On January 5, 2000, at which time the personal injury case was still pending, this court placed respondent on interim suspension. Mr. and Mrs. Collins were unaware of respondent's interim suspension until June 2000, when they were informed that a new attorney, Stephen Wiles,[2] would be representing them. Although Mr. Wiles acted as counsel for Mr. and Mrs. Collins during a mediation held in July 2000, respondent continued to be actively involved in the personal injury case and continued to advise Mr. and Mrs. Collins regarding the matter. On July 25, 2000, the case was settled for $325,000. Respondent deposited the settlement check into a bank account entitled "Cardell A. Thomas/Attorney At Law/Trust Account." On August 11, 2000, respondent wrote a check to Mr. and Mrs. Collins drawn on his client trust account in the amount of $191,000,

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[2] Mr. Wiles worked in respondent's law office.

representing their share of the settlement proceeds. Respondent then successfully negotiated a reduction in Mrs. Collins' medical expenses. On August 25, 2000, respondent paid the sum of $2,000 to Premier Physical Therapy Clinics on behalf of Mrs. Collins. This check was also drawn on respondent's client trust account.

Count II – The Kerne Matter

In January 2002, attorney E. Kelleher "Kelly" Simon filed a complaint against respondent with the ODC. Mr. Simon represented the defendants in personal injury litigation instituted by respondent on behalf of his clients, Lezin and Karen Kerne. *Karen Kerne and Lezin Kerne v. Manuel LaGrange and Allstate Ins. Co.,* No. 97-11987 on the docket of the 22nd Judicial District for the Parish of St. Tammany. Approximately two weeks after respondent's January 5, 2000 interim suspension, he and Paul Hymel, a claims adjuster for Allstate, reached an agreement to settle the Kerne case. On February 1, 2000, Mr. Simon forwarded the settlement check and the settlement documents to respondent. At that time, Mr. Simon was unaware of respondent's interim suspension. The executed settlement documents were never returned to Mr. Simon, despite his requests; however, Allstate subsequently confirmed that the settlement check cleared after it was deposited into respondent's client trust account.

DISCIPLINARY PROCEEDINGS

On January 10, 2005, the ODC filed two counts of formal charges against respondent, alleging that his conduct in the Collins and Kerne matters violated Rule 5.5 (engaging in the unauthorized practice of law) of the Rules of Professional Conduct. The ODC sought the imposition of permanent disbarment for respondent's misconduct.

Respondent answered the formal charges and admitted the factual allegations set forth therein. He also admitted that he "is guilty of additional professional misconduct warranting the imposition of discipline," though he did not specifically admit that his misconduct violated Rule 5.5. With respect to the issue of sanction, respondent contended that permanent disbarment cannot legally be imposed in this case,[3] and would in any event be disproportionate to the misconduct charged.

Formal Hearing

This matter proceeded to a hearing. The hearing committee received documentary evidence from both

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[3] Respondent asserted that the imposition of permanent disbarment would constitute an *ex post facto* application of the law. However, it is well settled that the amendments to Supreme Court Rule XIX, § 10 and § 24 providing for permanent disbarment do not have an *ex post facto* effect on cases arising prior to the adoption. *In re: Laudumiey and Mann*, 03-0234 (La. 6/27/03), 849 So. 2d 515, *cert. denied*, 540 U.S. 1048, 124 S. Ct. 814, 157 L. Ed. 2d 697 (2003).

respondent and the ODC. Respondent testified before the committee on his own behalf and on cross-examination by the ODC. In addition, the ODC offered the testimony of Mr. and Mrs. Collins, the complainants in Count I of the formal charges. At the conclusion of the hearing, the record was left open to obtain additional evidence relative to Count II. The perpetuation deposition of attorney Kelly Simon was taken on June 24, 2005 and was subsequently filed into the record, along with a certified copy of the records maintained by Paul Hymel, Allstate's claims adjuster, in connection with the Kerne personal injury case. Mr. Hymel's records reflect that settlement activity occurred in the Kerne case *after* the date of respondent's interim suspension. Specifically, Mr. Hymel made a note to his file on January 14, 2000 indicating that he received a voice mail message from respondent "stating his client was interested in settling case. Atty didn't say for how much. Called atty back and left message with him to call me." A second note, dated January 19, 2000, indicates that respondent called Mr. Hymel "to discuss settlement of this claim. He demanded $10,000 plus the specials. I refused. He demanded $10,000 plus court costs. He accepted $9,830 for the loss and it was agreed that we would reimburse him for provable court costs up to $500."

In his testimony before the committee, respondent admitted that he knew he could not practice law after his January 5, 2000 interim suspension; however, he maintained that he was unaware that depositing a

settlement check into his client trust account and disbursing the funds constituted the practice of law.[4] Rather, respondent testified that he thought of the practice of law as "giving advice, going to Court, charging fees for stuff and that kind of thing." Respondent also denied any belief that he was practicing law after his interim suspension by negotiating a reduction in the medical expenses incurred by Mrs. Collins, or by speaking with Mr. and Mrs. Collins concerning their personal injury case. Likewise, regarding the Kerne matter, respondent denied that he engaged in the practice of law after his interim suspension. Notwithstanding the records maintained by the Allstate adjuster, Mr. Hymel, which reflected settlement negotiations in the Kerne case after the date of respondent's interim suspension, respondent testified that the case had been settled prior to his interim suspension, but Allstate "took their time sending the check," necessitating further telephone contact after the interim suspension.

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[4] In 2000, when respondent's misconduct occurred, Rule 5.5(a) provided only that a lawyer shall not "practice law in a jurisdiction where doing so violates the regulation of the legal profession of that jurisdiction; . . . " Effective July 1, 2002, this court amended Rule 5.5 to specify certain activities that constitute the practice of law, and to provide that "a suspended lawyer shall not receive, disburse or otherwise handle client funds." Although the amended version of the rule is not applicable to the instant case, we believe it clarifies the type of conduct to which Rule 5.5 was always intended to apply.

Hearing Committee Report

In its report, the hearing committee acknowledged respondent's admission that the factual allegations of the formal charges are correct. The committee found respondent violated Rule 5.5 of the Rules of Professional Conduct, as that rule was in effect at the time of the misconduct, and that the only issue to be decided was the appropriate sanction to be imposed.

The committee determined that respondent's misconduct violated a duty owed to the profession and that respondent was negligent in engaging in the unauthorized practice of law. The committee further found that the actual or potential injury caused by the misconduct was "negligible," as the clients' cases were settled and the clients received the proceeds of the settlements. Based on these findings, the committee determined that the applicable baseline sanction is suspension under the ABA's *Standards for Imposing Lawyer Sanctions*.

The committee made the following findings regarding aggravating and mitigating factors:

> The Hearing Committee finds that the overriding aggravating factor in the instant case is the fact that the Respondent had previous violations of the Disciplinary Rules and that

the Respondent was disbarred at the time of the instant rule violation.[5]

However, the Hearing Committee finds that the Respondent's misconduct was strictly a technical violation of Rule 5.5 as he simply disbursed settlement funds to the clients after he had been disbarred. The Hearing Committee finds that the Respondent honestly believed that distributing the settlement proceeds was the proper thing to do once the cases had been settled. The Hearing Committee finds this reflects the absence of a dishonest or selfish motive on the part of the Respondent. The Hearing Committee believes that the Respondent did not know that simply disbursing the settlement funds could be considered a violation of the Rules of Professional Conduct. The Hearing Committee considers this a mitigating factor.

The Hearing Committee recognizes that the Respondent was cooperative with the disciplinary board throughout these proceedings and notes that Respondent did not dispute the facts. The Hearing Committee considers this to be a mitigating factor.

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[5] There are several references in the committee's report to the fact that respondent's misconduct occurred when he was disbarred. However, respondent was interimly suspended, not disbarred, at the time he engaged in the unauthorized practice of law.

> Finally, the Hearing Committee considers the long delay in these disciplinary proceedings as a mitigating factor.

Considering these findings, the committee recommended that respondent be suspended from the practice of law for an additional period of two years.

The ODC filed an objection to the hearing committee's recommendation.

Disciplinary Board Recommendation

Noting that respondent admitted to the factual allegations of both counts of the formal charges, the disciplinary board agreed that the hearing committee was correct in finding a violation of Rule 5.5(a). At the time of the misconduct at issue, Rule 5.5(a) provided that a lawyer should not practice law in a jurisdiction where doing so violated the regulation of the legal profession in that jurisdiction. This rule cross-referenced La. R.S. 37:212, the statute which defined the practice of law in Louisiana at that time. By continuing to hold himself out as an attorney, counseling clients, negotiating settlements with Allstate and Premier Physical Therapy, and depositing and disbursing settlement funds in his trust account, the board found that respondent engaged in the practice of law under the former version of Rule 5.5 and La. R.S. 37:212(A)(1) and (2)(a)(b)(c).

The board found that respondent violated duties owed to the profession and to the legal system. He acted intentionally in practicing law after his interim

suspension, primarily in order to protect his own fee interests.[6] Respondent blemished the reputation of the legal profession and caused significant potential harm to his former clients and the legal system. The baseline sanction for respondent's misconduct is disbarment.

The board found the sole mitigating factor present is delay in the disciplinary proceedings. The board found the following aggravating factors are present: prior disciplinary offenses, dishonest or selfish motive, a pattern of misconduct, multiple offenses, submission of false testimony during the disciplinary proceedings which was contrary to the facts to which he had previously stipulated in his answer to the formal charges, and substantial experience in the practice of law.

The board agreed with the ODC that Guideline 8 of the permanent disbarment guidelines (following notice, engaging in the unauthorized practice of law during the period of time in which the lawyer is suspended from the practice of law or disbarred) is applicable to this case. Respondent has not disputed the fact that he had notice of his interim suspension from the practice of law, effective January 5, 2000. He also has admitted that he engaged in actions following

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[6] In making this determination, the board cited respondent's testimony to the effect that he deposited the Collins' settlement check in his client trust account and disbursed the funds himself because he believed Mr. and Mrs. Collins were going to screw me out of my fee and my expenses."

his interim suspension which constitute the unauthorized practice of law. As such, the board found the conditions of Guideline 8 have been met.

Based on this reasoning, the board recommended that respondent be permanently disbarred. Two board members dissented and would adopt the hearing committee's recommendation that respondent serve an additional two-year suspension before becoming eligible for readmission.

Respondent filed an objection to the disciplinary board's recommendation. Accordingly, the case was docketed for oral argument pursuant to Supreme Court Rule XIX, § 11(G)(1)(b).

DISCUSSION

Bar disciplinary matters fall within the original jurisdiction of this court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. *In re: Quaid,* 94-1316 (La. 11/30/94), 646 So. 2d 343; *Louisiana State Bar Ass'n v. Boutall,* 597 So. 2d 444 (La. 1992). While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. *See In re: Caulfield,* 96-1401 (La. 11/25/96), 683 So. 2d 714; *In re: Pardue,* 93-2865 (La. 3/11/94), 633 So. 2d 150.

Respondent has admitted the factual allegations of the formal charges, and based upon that admission, as well as the other evidence in the record, we find there is clear and convincing evidence of his violation of Rule 5.5(a) of the Rules of Professional Conduct. Respondent counseled clients, negotiated the settlement of his clients' personal injury claim, handled client funds, and negotiated with a third-party healthcare provider on behalf of his clients, all at a point in time when he knew he was not allowed to practice law in this state because he was on interim suspension. Under these facts, there can be no doubt that respondent engaged in the unauthorized practice of law, in violation of Rule 5.5(a).

Having found evidence of professional misconduct, we now turn to a determination of the appropriate sanction for respondent's actions. In considering that issue, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis,* 513 So. 2d 1173 (La. 1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington,* 459 So. 2d 520 (La. 1984).

The sanctions imposed by this court for the unauthorized practice of law are largely dependent upon the individual circumstances of the case. In general, however, when the attorney has manifested

a conscious intent to flout the authority of this court by practicing law after being prohibited from doing so, we have not hesitated to impose disbarment. *See, e.g., In re: Jones,* 99-1036 (La. 10/19/99), 747 So. 2d 1081 (attorney disbarred for engaging in the unauthorized practice of law on four occasions, after being suspended in the past for similar misconduct). The serious nature of such actions is underscored by La. R.S. 37:213, in which our legislature has made it a felony to engage in the unauthorized practice of law. It was against this backdrop that we included the unauthorized practice of law as one of the types of conduct that might warrant permanent disbarment.[7]

There is no doubt that sanction is warranted here. Respondent intentionally engaged in the practice of law after he was placed on interim suspension by consent. This misconduct is even more egregious when one considers respondent's lengthy prior disciplinary record and his unwillingness in these proceedings to acknowledge the wrongfulness of his conduct.

In the final analysis, respondents refusal to respect the authority of this court demonstrates that

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[7] Notably, since the adoption of permanent disbarment in 2001, we have imposed that sanction in some twenty cases involving the unauthorized practice of law. *See, e.g., In re: Patrick*, 07-1222 (La. 12/14/07), ___ So.2d ___; *In re: Melton*, 05-0409 (La. 6/17/05), 905 So.2d 281; and *In re: Jefferson*, 04-0239 (La. 6/18/04), 878 So. 2d 503.

he lacks the fitness to hold a license to practice law. Therefore, he must be permanently disbarred.

DECREE

Upon review of the findings and recommendations of the hearing committee and the disciplinary board, and considering the record, briefs, and oral argument, it is ordered that the name of Cardell A. Thomas, Louisiana Bar Roll number 1148, be stricken from the roll of attorneys and that his license to practice law in the State of Louisiana be revoked. Pursuant to Supreme Court Rule XIX, § 24(A), it is further ordered that respondent be permanently prohibited from being readmitted to the practice of law in this state. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

SUPREME COURT OF LOUISIANA

No. 2007-B-1616

IN RE: CARDELL A. THOMAS

ATTORNEY DISCIPLINARY PROCEEDINGS

(Filed 01/16/08)

Johnson, J. dissents and assigns reasons:

Respondent is currently disbarred,[1] and has never sought readmission from this disbarment. Should Respondent apply for readmission to the practice of law, the Court at that time could consider any additional misconduct the lawyer may have committed. For this reason, it is not necessary today to consider these additional violations, and permanently disbar the respondent from the practice of law.

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[1] *See, In re: Thomas*, 00-1952 (La. 10/6/00), 770 So.2d 323.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: CARDELL A. THOMAS

NUMBER: 05-DB-005

RECOMMENDATION TO THE LOUISIANA SUPREME COURT

(Filed Aug. 6, 2007)

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This is a disciplinary matter brought by the Office of Disciplinary Counsel ("ODC") against the Respondent, Cardell A. Thomas ("Mr. Thomas" or "Respondent"). Respondent is currently disbarred from the practice of law for misconduct involving his failure to pay third-party medical providers, failure to account for and/or return unearned fees, neglect of clients' cases, failure to pay a photographer for services rendered to his law office, and failure to cooperate with ODC in its investigation of numerous disciplinary complaints. *See In re Thomas,* 2000-1952 (La. 10/9/00); 770 So.2d 323.[1] At the time of the misconduct at issue in this matter, Respondent was interimly suspended from the practice of law by the Louisiana Supreme Court, effective January 5, 2000.

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[1] Respondent's disbarment ended on October 6, 2005, but he has not yet applied for readmission to the practice of law. He therefore remains disbarred from the practice of law. *See In re Feazel,* 2001-2309 (La. 11/9/01); 800 So.2d 771 (attorney who was eligible to apply for reinstatement from his suspension from the practice of law had not done so at the time of the second disciplinary matter and therefore remained suspended).

See In re Thomas, 99-3547 (La. 1/5/00); 752 So.2d 169. For reasons stated below, the Disciplinary Board recommends that the Respondent be permanently disbarred from the practice of law.

PROCEDURAL HISTORY

Formal charges, consisting of two counts, were filed against the Respondent by ODC on January 10, 2005. In the charges, ODC alleges that the Respondent violated Rule of Professional Conduct 5.5 (unauthorized practice of law) in connection with his actions pertaining to two lawsuits in which he represented clients prior to and after the date of his interim suspension. The charges were served on the Respondent, and the Respondent filed an answer to the charges through his counsel Herbert V. Larson, Jr., on March 2, 2005. In his answer, Respondent admitted the factual allegations of Count I and Count II of the formal charges. He also admitted that he "is guilty of additional professional misconduct warranting imposition of a sanction." *See* Answer of Cardell Thomas to the Formal Charges, filed March 2, 2005. Respondent contended, however, that the sanction of permanent disbarment could not legally be imposed in the case, and if imposed, would be disproportionate to the misconduct charged.

ODC filed its pre-hearing memorandum on May 23, 2005. The Respondent filed his pre-hearing memorandum on the same date, and he also filed a supplemental pre-hearing memorandum on June 6,

2005. The hearing in this matter was held on June 8, 2005 before Hearing Committee Number 24. The hearing was held open in order for ODC to submit the deposition testimony of Kelly Simon, counsel for Allstate Insurance Company, and the deposition testimony of Paul Hymel, the Allstate adjuster, both of which pertained to Count II, and to receive the affidavit of Rudy Gorrell, which pertained to Count I.

Mr. Simon's deposition was filed into the record on July 8, 2005. On September 15, 2005, the parties submitted two joint stipulations through ODC's motion and order to supplement record, which was granted by the hearing committee chair, Jerald L. Album, on October 4, 2005. One stipulation consisted of the Allstate claims file which contained the notes reflecting the settlement negotiations between Mr. Hymel and Respondent in connection with the Kerne matter. The other stipulation included a copy of a letter dated March 29, 2000 from Rudy Gorel to Lisa Collins, previously introduced at the hearing as Exhibit "H." The parties stipulated that in the normal course of business in Mr. Gorel's office, this letter would have been mailed to the addressee, as addressed, first class postage prepaid.

The hearing committee issued its report in this matter on August 28, 2006, recommending that the Respondent receive a suspension for an additional period of two years. On September 11, 2006, a motion to substitute counsel was filed by ODC in which Charles B. Plattsmier sought to replace Julie B. White as disciplinary counsel in this matter. ODC's

motion was granted by Wanda Anderson Davis, Adjudicative Chair, on September 15, 2006. On October 5, 2006, ODC filed a motion to request an extension of time to submit pre-argument memorandum in this matter. This motion was granted by Joseph R. Ward, Jr., Chair of Panel "C" on October 6, 2006, allowing ODC until October 11, 2006 to file its memorandum. ODC filed its memorandum on October 10, 2006 in which it asserts that permanent disbarment is the appropriate sanction in this matter. The Respondent filed a reply to ODC's memorandum on October 18, 2006, arguing that the findings and recommendations of the hearing committee should be upheld and adopted by the Disciplinary Board. Oral argument before Panel "C" of the Disciplinary Board was held on October 26, 2006. Chief Disciplinary Counsel Charles B. Plattsmier appeared on behalf of ODC. The Respondent and his counsel, Mr. Larson, also appeared.

THE FORMAL CHARGES

COUNT I (Investigative No. 0012118)

Respondent, CARDELL A. THOMAS, was interimly suspended by order of the Louisiana Supreme Court, effective January 5, 2000. Complainants, Lisa Jenise Collins and Vernell Collins hired Respondent in July of 1997, to represent them as a result of injuries sustained in an automobile accident. Complainants were unaware until June of 2000 that Respondent was interimly suspended by order of the

Court, effective January 5, 2000. Although Complainants' new attorney, Stephen Wiles, acted as Complainants' counsel during a mediation held in July of 2000, Respondent continued to be actively involved in the case and continued to advise Complainants regarding the matter. As a result of the mediation, the case was settled for $325,000.00. The settlement check dated July 25, 2000, was made payable to Complainants, Respondent, and Attorney Stephen Wiles. On August 11, 2000, Respondent disbursed settlement funds to Vernell and Lisa Collins via check in the amount of $191,000.00, written out of Respondent's Bank One account entitled "Cardell A. Thomas, Attorney at Law, Trust Account." Such conduct constitutes the unauthorized practice of law, in violation of Rule 5.5 of the Rules of Professional Conduct. On August 25, 2000, Cardell Thomas disbursed settlement funds to Premier Physical Therapy Clinics, Inc., via a check in the amount of $2,000.00, written out of Respondent's Bank One account entitled "Cardell A. Thomas, Attorney at Law, Trust Account." This payment by Mr. Thomas to Premier Physical Therapy was the result of negotiations between Cardell Thomas, on behalf of Lisa and Vernell Collins, and Michael J. Johnston, on behalf of Premier Physical Therapy, for a reduction of Mrs. Collins' account balance. Said negotiations and payment took place after January 5, 2000, the effective date of Respondent's interim suspension. Such conduct constitutes the unauthorized practice of law, in violation of Rule 5.5 of the Rules of Professional Conduct.

COUNT II (Investigative No. 0014605)

Respondent was interimly suspended by order of the Louisiana Supreme Court, effective January 5, 2000. Respondent represented the plaintiffs in litigation entitled "Karen Kerne and Lezin Kerne v. Manual LaGrange and Allstate Insurance Company," bearing Docket No. 9711987, 22nd Judicial District Court for the Parish of St. Tammany. Complainant, Attorney E. Kelleher Simon, represented both defendants in the litigation. An agreement to settle was reached on January 16, 2000, between Respondent and Mr. Paul Hymel, a claim representative of Allstate Insurance Company. On February 1, 2000, Complainant forwarded the settlement funds and appropriate settlement documents to Respondent. At that time, Complainant was unaware of Respondent's suspension. The completed documents were not returned and subsequent efforts by Complainant to obtain same were unsuccessful. Allstate confirmed that the settlement check cleared and was deposited in Respondent's Trust Account. The aforementioned conduct of Respondent constitutes the unauthorized practice of law, in violation of Rule 5.5 of the Rules of Professional Conduct.

THE HEARING COMMITTEE'S REPORT

As noted above, the hearing committee issued its report on August 28, 2006. In its report, the committee found that the Respondent had admitted the factual allegations of both counts of formal charges.

The committee also concluded that the version of Rule 5.5 in effect at the time of the misconduct was the controlling law to be applied. The committee noted that the only issue before it was the appropriate sanction to be imposed.

The committee then determined that the Respondent had, if fact, violated Rule of Professional Conduct 5.5. However, it further found that the Respondent's conduct was a technical violation and did not cause any substantial damage to his clients.

In analyzing the Rule XIX, Section 10(c) factors[2] in order to determine the appropriate sanction, the committee determined that the Respondent's misconduct violated a duty owed to the profession and that he was negligent in engaging in the unauthorized practice of law after he had been disbarred[3]. The committee opined that the amount of actual or potential

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[2] These factors include:

(1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system or to the profession;

(2) whether the lawyer acted intentionally, knowingly or negligently;

(3) the amount of the actual or potential injury caused by the lawyer's misconduct; and

(4) the existence of any aggravating or mitigating factors.

[3] The Board notes that the Respondent was interimly suspended, not disbarred, at the time he engaged in the unauthorized practice of law.

injury in this particular matter was negligible; the cases were settled and the clients received the proceeds of the settlements. As an aggravating factor, the committee found prior discipline[4] and the fact that the Respondent was disbarred[5] at the time of the instant rule violations. As mitigating factors, the committee found absence of a dishonest or selfish motive, delay in the disciplinary proceedings and cooperative attitude towards the proceedings.

The committee also applied the *ABA Standards for Imposing Lawyer Sanctions* 7.2[6] and 8.2[7] in reaching its determination that the appropriate baseline sanction was a suspension. After considering the entire matter, the committee recommended that the Respondent be suspended from the practice of law for an additional period of two years.

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[4] The Respondent received two prior public reprimands in 1990 (90-DB-033 and 90-PDB-004) and an admonition in 1996 (95-ADB-078).

[5] Again, this finding is erroneous. The Respondent was interimly suspended, not disbarred, at the time of the instant misconduct.

[6] Standard 7.2 provides that "suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system."

[7] Standard 8.2 provides that "suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession."

ANALYSIS

I. The Standard of Review

The powers and duties of the Disciplinary board are defined in Section 2 of the Louisiana Supreme Court Rule XIX, Rules for Lawyer Disciplinary Enforcement. Subsection (G)(2)(a) states that the Board is "to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges . . . and prepare and forward to the court its own findings, if any, and recommendations." Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest error." *Arceneaux v. Domingue,* 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO,* 549 So. 2d 840 (La. 1989). The Board conducts *de novo* review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill,* 90-DB-004.

Here, the Board finds that the committee properly determined that the Respondent had admitted to the factual allegations of both counts of the formal charges. This finding does not constitute manifest error. *See* Answer of Cardell Thomas to the Formal Charges, para. I and II, filed March 2, 2005.

Based upon the factual findings and for the reasons stated in its report, the committee properly found that the Respondent had violated Rule of Professional Conduct 5.5(a) as well. This rule violation is addressed below:

***Rule 5.5(a)*:** At the time of the misconduct at issue, Rule 5.5(a) provided that a lawyer should not practice law in a jurisdiction where doing so violated the regulation of the legal profession in that jurisdiction. This rule cross-referenced La.R.S. 37:212, the statute which defined the practice of law in Louisiana at that time. La. R.S. 37:212 provided:

> The practice of law means and includes:
>
> (1) In a representative capacity, the appearance as an advocate, or the drawing of papers, pleadings or documents, or the performance of any act in connection with pending or prospective proceedings before any court of record in this state; or
>
> (2) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect;
>
> (a) The advising or counseling of another as to secular law;
>
> (b) On behalf of another, the drawing or procuring, or the assisting in the drawing or procuring of a paper, document, or instrument affecting or relating to secular rights;
>
> (c) The doing of any act, in behalf of another, tending to obtain or secure for the other the prevention or the redress of a wrong or the enforcement or establishment of a right; or

(d) Certifying or giving opinions as to title to immovable property or any interest therein or as to the rank or priority or validity of a lien, privilege or mortgage as well as the preparation of acts of sale, mortgages, credit sales or any acts or other documents passing titles to or encumbering immovable property.

B. Nothing in this Section prohibits any person from attending to and caring for his own business, claims, or demands; or from preparing abstracts of title; or from insuring titles to property, movable or immovable, or an interest therein, or a privilege and encumbrance thereon, but every title insurance contract relating to immovable property must be based upon the certification or opinion of a licensed Louisiana attorney authorized to engage in the practice of law. Nothing in this Section prohibits any person from performing, as a notary public, any act necessary or incidental to the exercise of the powers and functions of the office of notary public, as those powers are delineated in Louisiana Revised Statutes of 1950, Title 35, Section 1, et seq.

C. Nothing in this Section shall prohibit any partnership, corporation, or other legal entity from asserting any claim, not exceeding five thousand dollars, or defense pertaining to an open account or promissory note, or suit for eviction of tenants on its own behalf in the courts of limited jurisdiction on its own behalf through a duly authorized partner, shareholder, officer, employee, or duly authorized agent or representative. No partnership, corporation, or other entity

may assert any claim on behalf of another entity or any claim assigned to it.

D. Nothing in Article V, Section 24, of the Constitution of Louisiana or this Section shall prohibit justices or judges from performing all acts necessary or incumbent to the authorized exercise of duties as judge advocates or legal officers.[8]

Through his admission of the factual allegations of the formal charges, Respondent has admitted to: (1) continuing to be actively involved in Mr. and Mrs. Collins legal matter following his interim suspension; (2) disbursing settlement funds to Mr. and Mrs.

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[8] For reference, on July 1, 2002, Rule 5.5 was amended to clarify which actions are encompassed by the practice of law under this rule. Such actions include:

1) holding oneself out as an attorney or lawyer authorized to practice law;

2) rendering legal consultation or advice to a client;

3) appearing on behalf of a client in any hearing or proceeding, or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body operating in an adjudicative capacity, including submission of pleadings, except as may otherwise be permitted by law;

4) appearing as a representative of the client at a deposition or other discovery matter;

5) negotiating or transacting any matter for or on behalf of a client with third parties; or

6) otherwise engaging in activities defined by law or Supreme Court decision as constituting the practice of law.

In addition, the amended rule provides that a suspended lawyer shall not receive, disburse or otherwise handle client funds. *See* Rule of Professional Conduct 5.5(e)(3)(4).

Collins via check in the amount of $191,000.00, written out of his Bank One account entitled "Cardell A. Thomas, Attorney at Law, Trust Account, following his interim suspension; (3) disbursing settlement funds to Premier Physical Therapy Clinics, Inc., via a check in the amount of $2,000.00, written out of the same trust account; this disbursement followed negotiations he had on behalf of Mr. and Mrs. Collins with Premier Physical Therapy's representative for a reduction of Mrs. Collins' account balance, following his interim suspension; (4) settling Karen Kerne's and Lezin Kerne's personal injury claims with Paul Hymel, Allstate Insurance Company's adjuster, following his interim suspension; and (5) depositing Karen Kerne and Lezin Kerne's settlement check in his trust account, which also cleared, following his interim suspension.

Initially, the Board reiterates that in his answer, Respondent has admitted that he "is guilty of additional professional misconduct warranting imposition of a sanction." *See* Answer of Cardell Thomas to the Formal Charges, filed March 2, 2005. Therefore, Respondent has admitted to a violation of the only rule violation charged in this matter, the Rule 5.5(a) violation. Moreover, Respondent's actions detailed above constitute the unauthorized practice of law under the former version of Rule 5.5 cited above. Respondent continued to hold himself out as an attorney, counseling clients, negotiating settlements with Allstate and Premier Physical Therapy and depositing and disbursing settlement funds in his

trust account. Such actions are in violation of the former version of Rule 5.5 and La. R.S. 37:212, sections (1) and (2)(a)(b)(c).

As to the Rule XIX, Section 10(c) factors found by the committee, the Board finds that the committee erred in finding that the Respondent's conduct was negligent. As pointed out by ODC in its pre-argument brief, Respondent's own testimony indicates that his primary reason for his behavior was to protect his own fee interests and secure his own access to funds, leading only to the conclusion that his conduct was knowing and intentional.[9] The Board also finds that the committee correctly found that the aggravating factor of prior discipline was present. The Board finds that other aggravating factors are also present, including dishonest and selfish motive, pattern of misconduct, multiple offenses, submission of false testimony during the disciplinary proceedings which was contrary to the facts to which he had previously

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[9] For example, Respondent testified as follows:

Q. (By Larson): Okay, Now in terms of your motivation for depositing the money into your account and disbursing the funds, what motivated you?

R. (By Respondent): The fact that I thought and I mean Vernell and, you know he said, you know, he had lawyers, I had gotten information from – in the area and they would think about taking their file and trying to, you, in terms of, you know, I call it screw me out of my fee and my expenses. And that's what prompted them coming in in June.

Hrg. Comm. Tr., p. 123.

stipulated to in his answer[10] and substantial experience in the practice of law (admitted in 1983). The sole mitigating factor is delay in the disciplinary proceedings. The Board finds that the committee erred in finding that the mitigating factor of cooperative attitude toward the disciplinary proceedings and absence of dishonest and selfish motive were present.

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[10] For example, Respondent testified that he had no desire to practice law surreptitiously after he was interiorly suspended. He stated as to the Collins' case, "I never did anything on this file after I was disbarred, other than file the intervention." Hrg. Comm., Tr. p. 124. This is in direct conflict with his admission to the factual allegations of Count I, which states that after his interim suspension, he continued to be actively involved in the case, continued to advise Complaints regarding the matter, disbursed settlement proceeds in the matter to Mr. and Mrs. Collins, negotiated with Premier Physical Therapy to reduce Mrs. Collins' balance and then disbursed settlement funds to this medical provider.

Respondent also later specifically denied in his testimony that he continued to be actively involved in the Collins' case and continued to advise them. When reminded that he had stipulated to this fact by deputy disciplinary counsel, he stated "Herb may have stipulated to that," and added "Let me just say this. I wasn't giving any advice to Vernell or Lisa. They had a lawyer. I repeatedly used to tell them, Stephen will take care of it" Hrg. Comm. Tr., p. 134.

As to Count II, although he admits in his answer (via his blanket admission to allegations of the count) that he reached an agreement to settle the Kerne case with Paul Hymel, the Allstate adjuster, on January 16, 2000, following his interim suspension, he states in his testimony before the hearing committee that "I didn't anyway. Now if someone in my office did, I mean, I didn't." Hrg. Comm. Tr., p. 143.

II. The Appropriate Sanction

a. The Rule XIX, Section 10(c) Factors

Louisiana Supreme Court Rule XIX, Section 10(c) states that in imposing a sanction after a finding of lawyer misconduct, the Court or Board shall consider the following factors:

(1) Whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;

(2) Whether the lawyer acted intentionally, knowingly, or negligently;

(3) The amount of actual or potential injury caused by the lawyer's misconduct; and

(4) The existence of any aggravating or mitigating factors.

Here, the Respondent has violated his duty owed to the profession and to the legal system. He intentionally engaged in the unauthorized practice of law after he had been disbarred. The amount of potential injury was significant. By continuing to practice law after he was disbarred, the Respondent risked injuring his former clients and the legal system. He jeopardized his former clients' settlement negotiations. As noted above, the aggravating factors of prior discipline, dishonest and selfish motive, pattern of misconduct, multiple offenses, submission of false testimony during the disciplinary proceedings which was contrary to the facts to which he had previously stipulated to in his answer, and substantial experience in

the practice of law (admitted in 1983) are present. The sole mitigating factor present is delay in the disciplinary proceedings.

b. Application of the ABA Standards and Permanent Disbarment Guidelines

ABA Standard 7.1 provides that "disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." As described above, Respondent engaged in the misconduct at hand in order to protect his own fee interests and secure his own access to funds. He blemished the reputation of the legal profession and potentially harmed the legal system and his former clients by engaging in prohibited activity while he was interimly suspended. Restrictions on the practice of law are designed to protect the public, protect the integrity of the judicial system, and provide a means of regulation of the legal profession. The Respondent's failure to recognize these restrictions created the potential for serious injury to the legal system and to his former clients.

ODC correctly maintains that Permanent Disbarment Guideline Number 8 is applicable in this matter. Guideline Number 8 provides that permanent disbarment may be warranted when an attorney:

> Following notice, engage[es] in the unauthorized practice of law subsequent to resigning from the Bar Association, or during the period of time in which the lawyer is suspended from the practice of law or disbarred.

Here, the Respondent has not disputed the fact that he had notice that he was interimly suspended from the practice of law, effective January 5, 2000. He also has admitted that he engaged in actions which constitute the unauthorized practice of law following his interim suspension. As such, the conditions of Guideline Number 8 have been met, and the Board will therefore recommend that the Respondent be permanently disbarred from the practice of law.

The Board also points out that case law indicates that the Court has permanently disbarred attorneys for similar misconduct. In the case of *In re Jefferson,* 2004-0239 (La. 6/18/04); 878 So.2d 503, the respondent was found to have engaged in the unauthorized practice of law during the time period of June 1, 2000 and September 21, 2001, following his disbarment in 1995. The respondent notarized signatures on an escrow agreement, conducted settlement negotiations with opposing counsel, signed pleadings and engaged in other improper activities constituting the practice of law. Finding that both permanent disbarment guidelines 8 and 9 were applicable, the Court permanently disbarred Mr. Jefferson.

In the case of *In re Carver,* 2003-0653 (La. 3/28/03); 841 So.2d 770, the Court permanently disbarred an attorney for engaging in two acts of the

unauthorized practice of law while he was disbarred. In that matter, Carver had extensive prior disciplinary history, including being admonished or reprimanded on thirteen occasions prior to being disbarred in 1997.

Here, as the respondents in *Jefferson* and *Carver,* Mr. Thomas has engaged in the unauthorized practice of law at a time during which he prohibited to practice law. He also has extensive prior discipline, including an admonition, two public reprimands and a disbarment. The same sanction as imposed in *Jefferson* and *Carver,* permanent disbarment, should be imposed in this matter.

Finally, the Board notes that the Supreme Court has previously addressed the issue of whether permanent disbarment may be imposed when the misconduct at hand occurred prior to the amendment of Rule XIX which specifically recognized the Court's authority to permanently disbar lawyers. The Court has clearly stated that permanent disbarment may be imposed in such situations. *See In re Morphis,* 2001-2803 (La. 12/04/02); 831 So.2d 934; *In re Laudumiey and Mann,* 2003-0234 (La. 6/27/03); 849 So.2d 515 (the amendments to Rules XIX, Sections 10 and 24 pertaining to permanent disbarment do not constitute prohibitive *ex post facto laws* when applied to conduct predating those amendments).

CONCLUSION

The Board adopts the hearing committee's findings that the Respondent admitted the factual allegations of the formal charges and that he has violated Rule 5.5. However, the Board recommends that the committee's report be modified as noted above concerning the Rule XIX, Section 10(c) factors and the recommended sanction. The Board recommends that the Respondent be permanently disbarred, as his misconduct falls squarely within the parameters of Permanent Disbarment Guideline Number 8.

RECOMMENDATION

Based on the foregoing, the Board recommends that the Respondent, Cardell A. Thomas, be permanently disbarred from the practice of law. The Board further recommends that the Respondent be assessed with all costs and expenses of these proceedings.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Charles C. Beard, Jr.
Dennis W. Hennen
Billy R. Pesnell
Christopher H. Riviere
Joseph R. Ward, Jr.

BY: /s/ Lev M. Dawson
LEV M. DAWSON
FOR THE ADJUDICATIVE COMMITTEE

William D. Aaron, Jr. – Dissents with reason.
Linda P. Spain – Dissents with reason.
Michael S. Walsh – Recused.

Dissent By William D. Aaron, Jr.

Case Name: Cardell A. Thomas Docket No. 05-DB-005

The hearing committee which heard this matter recommended that Mr. Thomas serve an additional two (2) year suspension before becoming eligible for readmission, and I agree. The violations in question, although serious, do not merit permanent disbarment. The majority seeks to exact the death penalty, when but a pound of flesh will do.

/s/ William Aaron
WILLIAM D. AARON, JR

Date: 5/30/07

Dissent By Linda P Spain

Case Name: Cardell A. Thomas Docket No. 05-DB-005

It is my opinion that the hearing committee's recommendation that Mr. Thomas serve an additional two (2) year suspension before becoming eligible for readmission is appropriate and should be upheld. The

violations in question, although serious, do not merit permanent disbarment.

/s/ Linda Spain
Linda P Spain

Date: 6/14/07

LOUISIANA ATTORNEY DISCIPLINARY BOARD
IN RE: CARDELL A. THOMAS
NO. 05-DB-005

Report of Hearing Committee Number 24

(Filed Aug. 28, 2006)

I. INTRODUCTION

This matter came on for hearing before Hearing Committee Number 24 on June 8, 2005.

PRESENT: Cardell A. Thomas, and his attorney, Herbert Larsen Julie White, Deputy Disciplinary Counsel

II. FORMAL CHARGES

The following is a complete reproduction of the Formal Charges presented by the Office of Disciplinary Counsel:

COUNT I (Investigative No. 0012118)

Respondent, CARDELL A. THOMAS, was interimly suspended by order of the Louisiana Supreme Court, effective January 5, 2000. Complainants, Lisa Jenise Collins and Vernell Collins hired Respondent in July of 1997, to represent them as a result of injuries sustained in an automobile accident. Complainants were unaware until June of 2000, that Respondent was interimly suspended by order of the

Court, effective January 5, 2000. Although Complainants' new attorney, Stephen Wiles, acted as Complainants' counsel during a mediation held in July of 2000, Respondent continued to be actively involved in the case and continued to advise Complainants regarding the matter. As a result of the mediation, the case was settled for $325,000.00. The settlement check dated July 25, 2000, was made payable to Complainants, Respondent, and Attorney Stephen Wiles. On August 11, 2000, Respondent disbursed settlement funds to Vernell and Lisa Collins via check in the amount of $191,000.00, written out of Respondent's Bank One account entitled "Cardell A. Thomas, Attorney at Law, Trust Account." Such conduct constitutes the unauthorized practice of law, in violation of Rule 5.5 of the Rules of Professional Conduct. On August 25, 2000, Cardell Thomas disbursed settlement funds to Premier Physical Therapy Clinics, Inc., via a check in the amount of $2,000.00, written out of Respondent's Bank One account entitled "Cardell A. Thomas, Attorney at Law, Trust Account" This payment by Mr. Thomas to Premier Physical Therapy was the result of negotiations between Cardell Thomas, on behalf of Lisa and Vernell Collins, and Michael J. Johnston, on behalf of Premier Physical Therapy, for a reduction of Mrs. Collins' account balance. Said negotiations and payment took place after January 5, 2000, the effective date of Respondent's interim suspension. Such conduct constitutes the unauthorized practice of law, in violation of Rule 5.5 of the Rules of Professional Conduct.

COUNT II (Investigative No. 0014605)

Respondent was interimly suspended by order of the Louisiana Supreme Court, effective January 5, 2000. Respondent represented the plaintiffs in litigation entitled "Karen Kerne and Lezin Kerne v. Manual LaGrange and Allstate Insurance Company," bearing Docket No. 9711987, 22nd Judicial District Court for the Parish of St. Tammany. Complainant, Attorney E. Kelleher Simon, represented both defendants in the litigation. An agreement to settle was reached on January 16, 2000, between Respondent and Mr. Paul Hymel, a claim representative of Allstate Insurance Company. On February 1, 2000, Complainant forwarded the settlement funds and appropriate settlement documents to Respondent. At that time, Complainant was unaware of Respondent's suspension. The completed documents were not returned and subsequent efforts by Complainant to obtain same were unsuccessful. Allstate confirmed that the settlement check cleared and was deposited in Respondent's Trust Account. The aforementioned conduct of Respondent constitutes the unauthorized practice of law, in violation of Rule 5.5 of the Rules of Professional Conduct.

III. ALLEGED RULE VIOLATIONS

The Office of Disciplinary Counsel has alleged the violation of the following Rule of Professional Conduct by the Respondent, Cardell A. Thomas:

Rule 5.5 UNAUTHORIZED PRACTICE OF LAW

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession of that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law;

IV. SUMMARY OF THE PROCEDURAL ISSUES

The Respondent, Cardell A. Thomas, admitted the factual allegations of both counts of the Formal Charges presented by the Office of Disciplinary Counsel. The Respondent did dispute the imposition of the sanction of permanent disbarment as requested by the Office of Disciplinary Counsel. Therefore, the only issue before the hearing committee was the appropriate sanction to be imposed.

Rule 5.5 (Unauthorized Practice of Law) was amended subsequent to the alleged misconduct but before the hearing in this matter. The issue presented to the hearing committee was which version of Rule 5.5 is applicable to the instant complaint. The hearing committee decided that the version of Rule 5.5 which was in effect at the time of the alleged misconduct is controlling. Therefore, the earlier version of the rule will be applied.

V. SUMMARY OF THE EVIDENCE

Count I:

The Office of Disciplinary Counsel offered the testimony of Lisa Collins and Vernell Collins, the Complainants against the Respondent. The Collins' both testified that the Respondent had been their attorney for many years and that he was representing them in an action relative to an automobile accident which occurred in July, 1997. Shortly before the scheduled mediation of the case in June, 2000, the Respondent advised them he was "in some kind of trouble." The Collins' testified that they did not fully understand that Mr. Thomas was disbarred and therefore, could not represent them. They testified that they were surprised that the Respondent left the mediation after a short time and allowed Steven Wiles to represent them at the mediation. They further testified that Lisa Collins spoke on the telephone to the Respondent during the mediation.

After the case was settled, the Collins' had a fee dispute with the Respondent. They testified that at the time the settlements funds were distributed by Mr. Thomas, there was a dispute as to the amount the Collins' would receive. Subsequently, the Collins' lodged a complaint against the Respondent.

Counsel for the Respondent offered the testimony of the Respondent. Mr. Thomas testified that he had been disbarred in 2000. He further testified that he had a long attorney-client relationship with the Collins' and thought of them as friends. He stated

that he had settled a case for the Collins' against State Farm Insurance Company and did not accept a fee. Mr. Thomas testified that he had sent letters to his clients, the Collins', advising that Robert Jenkins had been associated on the case and that he had withdrawn from the case after having been disbarred on January 5, 2000. These letters were introduced into evidence. The Respondent testified that he withdrew from the Collins' case in January, 2000 and that he filed an Intervention to protect his fee and the costs he had expended. At that point in time, Steven Wiles took over handling the case. The Respondent admitted that he attended the mediation for a brief time to protect his intervention and that he left the mediation after he was assured that his name would appear on the settlement check. The Respondent denied having given the Collins' any legal advice subsequent to being disbarred, including during the mediation.

ODC 1 through 5 were admitted by stipulation.

Count II:

The Office of Disciplinary Counsel supplemented the record, post hearing, with the deposition of E. Kelleher Simon, an attorney. Mr. Simon testified that the had prepared the settlement document on behalf of Allstate Insurance Company after his adjuster, Paul Hymel, had settled the case of Karen and Lezin Kerne with the Respondent. Mr. Simon contacted the Louisiana Bar Association when he learned that the settlement check had been negotiated yet the releases

and motion to dismiss had not been returned. Mr. Simon was informed by the Bar Association that because the negotiating and depositing of the settlement check into the Respondent's trust account had occurred after the date of the Respondent's disbarment, that Mr. Thomas had engaged in the unauthorized practice of law. Mr. Simon was further informed that he (Mr. Simon), as a member of the Bar, was required to file a complaint.

The Office of the Disciplinary Counsel also supplemented the record with a joint stipulation with counsel for the Respondent submitting a letter authored by Rudy Gorrell, and the claims file in the Kerne versus Allstate Insurance Company matter.

VI. FINDINGS OF FACT

The Respondent, Cardell A. Thomas, admitted the factual allegations of both counts of the Formal Charges presented by the Office of Disciplinary Counsel. Therefore, the Hearing Committee accepts the facts as presented.

VII. DETERMINATION OF RULE VIOLATED

The Hearing Committee finds that the Office of Disciplinary Counsel has proved, by clear and convincing evidence that the Respondent's conduct did constitute the unauthorized practice of law. The Hearing Committee further finds that the Respondent's conduct was a technical violation of Rule 5.5

but did not cause any substantial damage to his clients.

VIII. ASSESSMENT OF BASELINE SANCTION

The Hearing Committee has determined that the violation of Rule 5.5 in the instant case generally falls under Standards 7.0 and 8.0 of the A.B.A. Standards for Imposing Sanctions. Specifically, the Hearing Committee finds that the Respondent's misconduct violated a duty to the profession and that the Respondent was negligent in engaging in the unauthorized practice of law after he had been disbarred. The Hearing Committee further finds that the amount of actual or potential injury in this particular matter is negligible. The cases were settled and the clients received the proceeds of the settlements. Nevertheless, the Hearing Committee takes cognizance of the fact that the unauthorized practice of law by a disbarred attorney is very serious misconduct.

A.B.A. Standard 7.2 provides:

"Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system."

A.B.A. Standard 8.2 provides:

"Suspension is generally appropriate when a lawyer had been reprimanded for the same or similar misconduct and engages in further acts of misconduct

that cause injury or potential injury to a client, the public, the legal system, or the profession."

The Hearing Committee finds that suspension is the sanction that is warranted in the instant case.

IX. CONSIDERATION OF MITIGATING AND AGGRAVATING FACTORS

The Hearing Committee finds that the overriding aggravating factor in the instant case is the fact that the Respondent had previous violations of the Disciplinary Rules and that the Respondent was disbarred at the time of the instant rule violation.

However, the Hearing Committee finds that the Respondent's misconduct was strictly a technical violation of Rule 5.5 as he simply disbursed settlement funds to the clients after he had been disbarred. The Hearing Committee finds that the Respondent honestly believed that distributing the settlement proceeds was the proper thing to do once the cases had been settled. The Hearing Committee finds this reflects the absence of a dishonest or selfish motive on the part of the Respondent. The Hearing Committee believes the Respondent did not know that simply disbursing the settlement funds could be considered a violation of the Rules of Professional Conduct. The Hearing Committee considers this a mitigating factor.

The Hearing Committee recognizes that the Respondent was cooperative with the disciplinary board throughout these proceedings and notes that

the Respondent did not dispute the facts. The Hearing Committee considers this to be a mitigating factor.

Finally, the Hearing Committee considers the long delay in these disciplinary proceedings as a mitigating factor.

X. SANCTION RECOMMENDED

The Hearing Committee recommends that the Respondent, Cardell Thomas be suspended from the practice of law for an additional period of two (2) years.

Covington, Louisiana, this 22nd day of August 2006.

HEARING COMMITTEE NUMBER 24

Jerald L. Album, Chair

Tracy Ann Petruccelli, Lawyer Member

Joe Gordon, Public Member

BY: /s/ Tracy Ann Petruccelli
Tracy Ann Petruccelli
For the Committee